



The State of Magistrate Court:
2016-17 Data Collection Period
Court Watch NOLA

Executive Summary

Court Watch NOLA (CWN) is a non-profit organization with the mission of promoting reform in the Orleans Parish criminal court system through civic engagement and courtroom observation. In May 2016, CWN began monitoring Orleans Parish Magistrate Court, where pre-trial release and bail are initially determined for all state felony and misdemeanor cases. For the purposes of this report, CWN volunteers observed Orleans Parish Magistrate Court from May 2016 to May 2017, viewing a total of 1,099 defendants' first appearances. This report explores these first appearances, the people who work in the magistrate court, the bail and bond system, and New Orleans's move towards a stronger, evidence-based pre-trial system. The following is a summary of the CWN observations and recommendations:

Appointment of Orleans Parish Magistrate Court Commissioners

An elected magistrate judge and four commissioners preside over Orleans Parish Magistrate Court. Commissioners are appointed by the twelve elected Orleans Parish District Court judges and the Orleans Parish magistrate judge.ⁱ There are very few formal requirements a candidate must fulfill to be a commissioner under Louisiana law; there are even fewer rules regulating the process by which a commissioner is chosen. Further, there are no rules protecting the commissioner selection process from conflicts of interest.

- **Recommendation 1:** Orleans Parish Criminal District Court judges should develop written policies and procedures to aid the process of commissioner appointment. These written policies and procedures should be posted on the Orleans Parish Criminal District Court's website and provided to all applicants. These written policies should include a section on how conflicts of interest in the commissioner selection process will be avoided to preserve the integrity of the process. The written policies and procedures should also include a list of qualities sought after in commissioner applicants.

Setting Bail: Ability to Pay

The United States Supreme Court has stated that "since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant."ⁱⁱ The American Bar Association further recommends that financial conditions of bail be the result of an individualized decision, considering the special circumstances of each defendant, the defendant's ability to meet the financial conditions, and the defendant's risk of not appearing if released.ⁱⁱⁱ

- **Recommendation 2:** The magistrate or commissioners should not have a blanket policy refusing to set bonds below a certain amount for all defendants regardless of individual circumstances. Both Louisiana law and the U.S. Constitution require that the defendant's ability to pay and individualized circumstances always be considered when setting bail.

Setting Bail: Evidence-Based Criteria

As part of the current bail reform movement, pre-trial services (PTS) programs have developed to offer the court evidence-based criteria related to the defendant's likelihood of returning for his or her subsequent court dates and the defendant's likelihood of rearrest. The Vera Institute of Justice (Vera) created the first New Orleans PTS program in 2012. In March 2017, Vera turned the PTS program over to the Orleans Parish Criminal District Court to operate, with supervision from the Louisiana Supreme Court. The City of New Orleans currently funds the program.

- **Recommendation 3:** The City of New Orleans should continue to financially support the Pretrial Services Program operated by the Orleans Parish Criminal District Court. While the program is still developing, it needs strong and careful supervision from the Louisiana State Supreme Court. Pre-trial services program representatives should be required to appear in front of the New Orleans City Council Criminal Justice Committee during budget season. A public process is necessary because the Pretrial Services Program is sustained with city resources.

Setting Bail: The Defendant's Pending Criminal Charges

Pending charges are not as strongly correlated with the defendant's successful return to court for subsequent court dates or the defendant's risk of rearrest, as other factors such as prior criminal history, age, etc.^{iv} The criminal district court operated PTS program produces risk scores that are designed to supplement the magistrate judge or commissioner's discretion in deciding pretrial release outcomes. Risk scores examine certain information to determine the defendant's individualized likelihood of returning to court for subsequent court appearances and the defendant's risk of rearrest. It is a national best practice and consistent with the protocol established by the criminal district court operated PTS program, that in determining a risk score, the defendant's pending criminal charges are not overly emphasized.^v Judges should rely on the totality of a defendant's individualized circumstances, as captured by PTS reports, rather than placing undue emphasis on the defendant's pending charges in making pretrial release decisions.

- **Recommendation 4:** The magistrate judge and commissioners should not overly rely on the defendant's pending criminal charges when determining pretrial release. The exclusive examination of the defendant's pending criminal charges has been shown to be unreliable in determining the defendant's likelihood in returning to court and likelihood of rearrest. The magistrate judge and commissioners' overreliance on defendants' pending criminal charges may impact both the defendant's liberty and the public's safety.

Pre-Trial Supervision

Not all defendants should be required to comply with pre-trial supervision; some defendants should simply be released on their own recognizance (ROR) to return to court for later court dates.

Requiring too many low- and moderate-risk defendants to comply with pre-trial supervision (to meet regularly for check-ins and comply with other program requirements), has been associated with increased rates of rearrest and lower rates of returning to court.^{vi} Additionally, pre-trial supervision is only intended to be a condition placed upon defendants released from jail. High bail amounts may prohibit defendants from bonding out of jail, and therefore the magistrate or commissioners should not assign pre-trial supervision to defendants who are unlikely to be able to pay a high bail and will remain incarcerated.

- **Recommendation 5:** The magistrate judge and commissioners should not primarily require low-risk defendants to comply with pre-trial supervision and should consider offering pretrial services supervision to higher risk defendants. It is inefficient and ineffective to overly concentrate pretrial services supervision on low-risk offenders. Pre-trial supervision should not be recommended where the magistrate judge or commissioner requires bail and the defendant is incapable of paying the bail.

Other Pre-Trial Release Conditions

National studies have shown that regular drug testing does not improve rearrest rates or the defendant's likelihood to return to court for subsequent court dates.^{vii} In contrast, a regular reminder to the defendant of an upcoming court date provided by pre-trial services staff has been shown to have a positive effect on both rearrest rates and the defendant's likelihood to return to court.^{viii}

- **Recommendation 6:** In its reports to the Louisiana Supreme Court, the Orleans Parish Criminal District Court operated pretrial supervision program should report the number of defendants required to comply with drug testing and the number of defendants who receive reminders for upcoming court dates. Pretrial services should also report whether drug tests or reminders improve pretrial outcomes in Orleans Parish Magistrate Court.

Increase the Use of ROR Pilot Project (the Pilot Project)

In May 2017, all Criminal District Court judges gave authorization to the launch of the “Increase the Use of ROR Pilot Project” in Commissioner Jonathan Friedman’s court. The only judge who did not sign off on the pilot project was Magistrate Judge Cantrell.^{ix} The purpose of the Pilot Project was to release a greater number of lower risk pre-trial defendants. The Pilot Project ran from May 27, 2017 to August 31, 2017.^x

- **Commendation 1:** CWN commends all the Orleans Parish Criminal District Court judges, along with Commissioner Jonathan Friedman, for authorizing the Pilot Project to be launched in Commissioner Friedman’s court. While it can be disconcerting to try new approaches to criminal justice in a high stakes environment, New Orleans cannot afford to continue approaching issues of public safety and criminal justice in a haphazard way. Bail

should be decided based on evidence-based risk assessments that keep public safety in consideration, and not based on wealth-based discrimination.

Right to Counsel

In Orleans Parish Magistrate Court's first appearances, the right to counsel is guaranteed.^{xi} If counsel is to be effective, it must also be free of judicial control.^{xii} CWN observers have observed Magistrate Judge Cantrell setting bail on unrepresented defendants. CWN observers have observed Magistrate Judge Cantrell limiting public defenders to only a few minutes to speak to each defendant before the public defender is expected to argue pre-trial release and bail. CWN has observed that when Magistrate Cantrell determines that "time is up" for the confidential attorney-client conversation, he will order the deputy sheriff to open the door of the attorney-client booth and order the defendant to leave, thus abruptly ending the 'confidential' attorney-client conversation.

- **Recommendation 7:** The right to counsel should be respected in Orleans Parish Magistrate Court. All defendants should be represented by counsel at first appearances. Orleans Public Defenders should be allowed to represent defendants for first appearances only where the defendant has no attorney present in court. Magistrate Judge Cantrell should provide sufficient time in his courtroom for confidential attorney-client consultations prior to bail arguments.

ⁱ Ken Daley, *Attorney, Former Prosecutor Brigid Collins named Orleans Parish Magistrate Commissioner*, THE TIMES-PICAYUNE (Feb. 3, 2016), http://www.nola.com/crime/index.ssf/2016/02/attorney_former_prosecutor_bri.html.

ⁱⁱ *Id.* at 5.

ⁱⁱⁱ *Pretrial Release*, A.B.A. Sec. Pub. Crim. Just. (2015).

https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk.html (Last visited Sept. 22, 2017). Standard 10-5.3. (e) Release on financial conditions.

^{iv} *Public Safety Assessment: Risk Factors and Formula*, LAURA AND JOHN ARNOLD FOUND 3, available at <http://www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf>. Although the current pre-trial risk assessment gives stronger weight to factors such as age and criminal history over current pending charges, itself was criticized for overemphasizing pending charges in its risk assessment.

^v *Public Safety Assessment: Risk Factors and Formula*, LAURA AND JOHN ARNOLD FOUNDATION 3, available at <http://www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf>. (Although the current pre-trial risk assessment gives stronger weight to factors such as age and criminal history over current pending charges, itself was criticized for overemphasizing pending charges in its risk assessment.)

^{vi} *Pretrial Risk Assessment*, PRETRIAL Jus. Inst., available at <http://www.pretrial.org/solutions/risk-assessment/> (Last visited Sept. 17, 2017); *Public Safety Assessment: Risk Factors and Formula*, LAURA AND JOHN ARNOLD FOUNDATION 3, available at <http://www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf> (Last visited Sept. 17, 2017).

^{vii} *Id.*

^{viii} *Pretrial Services & Supervision*, PRETRIAL Jus. Ctr. for Cts., available at <http://www.ncsc.org/Microsites/PJCC/Home/Topics/Pretrial-Services.aspx> (Last visited Sept. 17, 2017).

^{ix} Meeting with Calvin Johnson (May 25, 2017 at 4:00 pm).

^x Email from Sarah Schirmer, Criminal Justice Policy Advisor, Mayor's Office of Criminal Justice Coordination to Simone Levine, Executive Director Court Watch NOLA (Sept. 19, 2017 07:10cst) (on file with author).

^{xi} It enables counsel to argue in favor of a lower bond or fewer restrictions on an arrestee's liberty. And it allows for an initial exchange of information between an accused and counsel, so that counsel may begin investigating charges and may provide legal advice to an accused. Having counsel present also provides for a more just adversarial proceeding, as the accused has counsel to defend against the arguments made by the representative of the District Attorney's office present at first appearances.

^{xii} *Polk County v. Dodson*, 454 U.S. 312, 321 (1981).